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In the
Supreme Court of the United States

DOUG MORGAN; ROBIN MORGAN; JIM SHELL; SUNNY SHELL; SHERRIE VERSHER; AND CHRISTINE WADE,

PETITIONERS,

v.

PLANO INDEPENDENT SCHOOL DISTRICT, ET AL.,

RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The petition asks the Court to review a straightforward question of law: Is the constitutionality of a student speech policy governed by *Tinker*'s "substantial disruption" standard or *O'Brien*'s intermediate scrutiny standard? As explained in the petition, there is a well-recognized split among the lower courts of appeals; the Fifth Circuit's decision applying *O'Brien* to restrictions on "pure speech" is at odds with this Court's precedents; and this case presents a clean vehicle for resolving the important legal question presented.

The collective focus of Respondents' two oppositions is less on denying the split in authority and more on arguing the merits of their side of the split and complaining that allegations of misconduct are only allegations at this stage of the case. Petitioners firmly disagree with Respondents' view that *Tinker* is limited to cases involving viewpoint- or content-based discrimination. But, more importantly, a number of circuits disagree with Respondents and the Fifth Circuit. A final resolution of the merits arguments that Respondents are eager to reach can await plenary review after this Court grants certiorari to resolve the circuit split.

Moreover, contrary to Respondents' assertions, the fact that this case is in the posture of a facial challenge is no reason to deny the petition. This Court has never hesitated to resolve facial challenges to overreaching restrictions on speech where (as here) the case "does not rest on factual

assumptions." *United States v. Stevens*, 130 S. Ct. 1577, 1587 (2010). The school district's sweeping restrictions on speech open a huge potential for abuse, including some of the misconduct noted in the petition. It is the potential for such abuse that raises concerns under the First Amendment, and it is why the facial nature of the challenge provides no reason for this Court to deny review.

I. The Decision Below Conflicts With Decisions From Other Courts Of Appeals.

Respondents assert, echoing the decision below, that *Tinker* establishes a limited rule that applies only when "testing the validity of a viewpoint-based absolute prohibition on particular expression in public schools." Plano Opp'n 19. Petitioners respectfully disagree for reasons explained in the petition. *See* Pet. 24–30. But, more importantly, a number of courts of appeals have expressly disagreed as well, which creates the circuit split the Fifth Circuit previously acknowledged. *See Canady v. Bossier Parish Sch. Bd.*, 240 F.3d 437, 443 (5th Cir. 2001). In particular, other circuits have rebuffed the notion that *Tinker* is relevant only to viewpoint-based discrimination, holding that (with limited exceptions) *Tinker* "applies to *all* non-school-sponsored student speech." *Guiles v. Marineau*, 461 F.3d 320, 326 (2d Cir. 2006) (emphasis added). In these circuits, *Tinker* is not the limited standard that Respondents posit; instead, it is a "*general rule*" that applies except with respect to three narrow categories of speech that this Court has carved out from *Tinker*'s ambit. *Saxe v. State Coll.*

Areas Sch. Dist., 240 F.3d 200, 214 (3d Cir. 2003) (emphasis added); *Guiles*, 461 F.3d at 326.

Respondents contend that the conflict identified in the petition is an "imagined split," Plano Opp'n 22, and that "there is no ... confusion among the courts of appeals." *Id.* at 13; *see also id.* at 3, 20. But these assertions cannot be squared with the Fifth Circuit's own acknowledgement of a split and a legion of court decisions and law review articles recognizing that whether *Tinker* applies to content- and viewpoint-neutral restrictions on speech "is unclear" because "the circuit courts are currently divided." R. George Wright, *Doubtful Threats and the Limits of Student Speech Rights*, 42 U.C. DAVIS L. REV. 679, 712–13 (2009). When the Fifth Circuit first advanced the view that *Tinker* applies only to content- and viewpoint-neutral restrictions, it acknowledged that it was breaking ranks with "several circuits" that had applied *Tinker* to cases beyond the "viewpoint-specific category." *Canady*, 240 F.3d at 443. More recently, the Second Circuit lamented the "lack of clarity" in this Court's student-speech cases over whether *Tinker* establishes a general rule or applies only to viewpoint-based discrimination. *Guiles*, 461 F.3d at 326.

The split in authority has also been recognized by numerous district courts. *See, e.g., C.H. v. Bridgeton Bd. of Educ.*, No. 09-5815, 2010 WL 1644612, at **5–6 (D.N.J. Apr. 22, 2010) (discussing split); *Bar-Navon v. School Bd. of Brevard County*, No. 6:06-cv-1434, 2007 WL 3284322, at *6 (M.D. Fla. Nov. 5, 2007) (courts "are split" as to whether *Tinker* is a "basic standard").

And it has been grist for law review articles. *See* Pet. 21. As commentators have explained, most courts have concluded that *Tinker* supplies "the default standard" in student speech cases, but "at least three" courts of appeals have adopted Respondents' minority position, limiting *Tinker* to the "relatively rare instance when a regulation discriminates based on the speaker's viewpoint." Frank D. LoMonte, *Shrinking Tinker: Students are "Persons" Under Our Constitution—Except When They Aren't*, 58 AM. U. L. REV. 1323, 1328 (2009). In short, it is widely recognized that courts "at all levels have demonstrated confusion as to the scope of *Tinker's* holding." *Bar-Navon*, 2007 WL 3284322, at *5.

Respondents attempt to paper over this confusion, arguing that "no Circuit has applied *Tinker* to content-neutral time, place, and manner regulation of student distribution of materials." Plano Opp'n 20 (subheading). In their view, the split in precedent dissolves if legal rulings are overlooked and the cases parsed on their facts. Respondents contend that the many court decisions pronouncing *Tinker* a "general rule" are irrelevant because the decisions (arguably) did not address content-neutral time, place, and manner restrictions on speech.

This attempt to fly-spec factual scenarios addressed in lower court decisions only confirms the weakness of Respondents' position. Respondents' factual parsings are distortions that are ultimately beside the point, for the courts that apply *Tinker* as a general default rule have no cause to focus on whether student-speech

restrictions are content-based or not. Respondents ignore the straightforward *legal issue* set out in the question presented: should the constitutionality of a student speech policy be evaluated under *Tinker*'s "substantial disruption" standard or *O'Brien*'s "intermediate scrutiny" standard? That question can be resolved without focusing on the facts of the particular policy. In any event, to the extent other courts have not confronted such sweeping bans on student speech, that is a testament to the breadth of Respondents' policy and the narrowness of their conception of student speech rights, not a reason to deny certiorari. *See* Swanson Opp'n 11–12 (pressing position that elementary school students have no speech rights).

In any event, it is clear that, in direct conflict with the decision below, courts in other circuits have applied *Tinker* when evaluating all manner of student speech policies. *See, e.g.*, *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008) (applying *Tinker* to sexual harassment policy prohibiting "gender-motivated" speech); *McCauley v. University of V.I.*, No. 2005-188, 2009 WL 2634368, at *14 (D.V.I. Aug. 21, 2009) (applying *Tinker* in facial challenge to "hazing-harassment" provisions of student code restricting speech); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357 (M.D. Pa. 2003) (applying *Tinker* in facial challenge to university speech policy). This Court can and should grant review to resolve this conflict and to bring clarity to this unsettled area of law.

II. The Decision Below Conflicts With This Court's Precedents.

Respondents offer no direct response to the fact that the Fifth Circuit's decision contravenes fundamental principles in this Court's First Amendment student speech jurisprudence. Pet. 22–30. They do not defend the Fifth Circuit's novel conclusion that *O'Brien* applies to restrictions on "pure speech." App. 8–9 (that "'pure speech' is being regulated here is of no moment"). For reasons explained in the petition, that conclusion conflicts with this Court's precedents limiting "*O'Brien*'s relatively lenient standard to those cases" in which the "governmental interest" is "unconnected to expression" and "unrelated to the suppression of free expression." *Texas v. Johnson*, 491 U.S. 397, 401 (1989); *see* Pet. 23–24. Whatever the proper test for content-neutral restrictions on free speech, there is no reason—certainly Respondents offer none—that *O'Brien* would be the test. To that end, Respondents' complaint that petitioners seek greater free speech rights for students than adults gets things backwards. No one could seriously argue that *O'Brien* applies to restrictions on "pure speech" by adults. *Spence v. Washington*, 418 U.S. 405, 411, 414 n.8 (1974).

Respondents seek to distance themselves from the Fifth Circuit's misguided rationale, suggesting that the distinction between "pure speech" and "expressive conduct" is unhelpful and that the "relevant distinction is not in the form of the expression but in the form and scope of the regulations." Plano Opp'n 19. But *O'Brien* is all about providing less protection to conduct that is

not "pure speech." Moreover, Respondents' suggestion is "diametrically opposed to the teachings" of this Court's decisions in *Tinker*, *Hazelwood*, *Fraser*, and *Morse*, which have "consistently focused on the nature of the speech itself." *Jacobs v. Clark County Sch. Dist.*, 526 F.3d 419, 442–43 (9th Cir. 2008) (Thomas, J., dissenting). Contrary to Respondents' assertions, it "is the character of the speech, not the content of the government regulation that forms the framework of the First Amendment analysis in student speech cases." *Id.* at 443.

The point is confirmed by *Tinker* itself. Although, as Respondents note, *Tinker* involved expressive conduct (wearing armbands), the Court took pains to emphasize that the conduct was "closely akin to 'pure speech' ... entitled to comprehensive protection under the First Amendment." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505–06 (1969). Accordingly, even though the school's no-armbands policy was facially viewpoint- and content-neutral, *Tinker* held that the school could not prohibit students from wearing armbands. Pet. 24–25. Tellingly, although Respondents argue that the form of regulation is the touchstone for First Amendment analysis, their own efforts to distinguish lower court decisions fixate on the form of speech. *See* Plano Opp'n 21–23 (characterizing cases as addressing students' rights to wear T-shirts, distribute non-curricular materials, and draw violent pictures).

Respondents further contend that Petitioners' arguments rely "on a false dichotomy between"

Tinker and *O'Brien*. In fact, the shoe is on the other foot. Contrary to Respondents' extravagant claims, Petitioners have never argued that *Tinker* "transforms schools" into a "super-public forum, in which time, place, and manner limitations are facially invalid." Plano Opp'n 18. Nor do Petitioners seek a "constitutional standard under which students have an unfettered constitutional right to pass love notes or talk out of turn." *Id.* To the contrary, as *Tinker* recognized, school officials have broad authority to restrict student speech "for any reason—whether it stems from *time*, *place*, or *type* of behavior"—if it "materially disrupts class work or involves substantial disorder or invasion of the rights of others." *Tinker*, 393 U.S. at 513 (emphasis added). *Tinker* is a test that is tailored to the "time" and "place" of the school setting. Pet. 2. Taking account of the "special characteristics of the school environment," that test furthers the interests of school officials in maintaining discipline, while scrupulously protecting student liberties. *Tinker*, 393 U.S. at 506. Lowering the standard for content-neutral time, place, and manner restrictions, as Respondents suggest, amounts to impermissible double-counting that dilutes essential First Amendment protections.

Throughout their opposition, Respondents take the startling position that because it is content-neutral the school district's speech policy somehow "does not involve a prohibition on speech." Plano Opp'n 13 (the "policy ... does not prohibit *any* speech") (emphasis added). Respondents even go so far as to suggest that the policy is "all about how certain protected speech ... *can be accommodated* in

a school setting." *Id.* at 14 (emphasis added). But "content-neutrality" is not a First Amendment virtue when all content is suppressed, and wringing all speech out of the school system is an odd "accommodating" of protected speech. The policy broadly prohibits student "[d]istribution" of "materials" in "classrooms" during "school hours," App. 99, 103, with breathtakingly expansive definitions of each term: "Distribution" means the "circulation of any ... writing, items, objects, articles or other materials." App. 98. "Classrooms" mean any location for providing or facilitating "student instruction," "school-sponsored extracurricular activities," or "programming for students," including "gymnasiums, auditoriums, cafeterias, hallways, and outdoor facilities." *Id.* And "school hours" encompass both instructional hours and any hours when students are participating in extracurricular activities. *Id.* In effect, the *Student Expression* policy bans the distribution of any form of written material in any school building at nearly any time that school doors are open to students.

To be sure, as the petition recognizes, there are limited exemptions from the policy's anti-speech provisions. Students may, for example, distribute materials for 30 minutes before and after "school hours" at the school's entrance or exit, or at designated "gathering area[s]." *Id.* at 99, 103. Elementary school students may distribute materials three times a year at school-sanctioned parties. *Id.* at 101. And secondary school students may distribute materials in "hallways during non-

instructional times" and during "designated lunch periods." *Id.* at 103.

But those narrow exceptions only highlight the sweeping nature of the speech restrictions. In arguing that schools may ban all forms of written speech, as long as they leave open certain narrow exceptions, Respondents turn the First Amendment on its head. As *Tinker* recognized, "in our system, state-operated schools may not be enclaves of totalitarianism." *Tinker*, 393 U.S. at 511. And the central principle of *Tinker* cannot be eviscerated by wringing speech rights from the school day.

III. This Case Presents An Ideal Vehicle For Resolving An Important, Recurring Issue.

For reasons set out in the petition, the Court should grant certiorari because the dispute over the standard of review is cleanly presented in this case. *See* Pet. 30–33. Respondents disagree, contending that review should be denied because the case is in an "interlocutory posture," the factual record is incomplete, and facial challenges are purportedly disfavored. None of these assertions withstand scrutiny.

In this case, Respondents' supposed vices are in fact virtues. The district court granted interlocutory review to allow appellate courts to resolve "the distinct legal question regarding the facial constitutionality of the school district policies." App. 22. Whatever questions the Fifth Circuit may have raised about teeing up that purely legal question as a matter of efficiency, the Fifth Circuit "defer[red] to the judgment of the

district court" and decided the legal issue, ruling definitively that *Tinker* does not apply to viewpoint-neutral student speech codes. The issue of what standard applies is thus ripe for this Court's decision. The interlocutory nature of this case only means that the Fifth Circuit's erroneous standard—and not *Tinker*—will govern further proceedings. *See* ROBERT L. STERN, ET AL., SUPREME COURT PRACTICE 281 (9th ed. 2007) (when "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case ... the case may be reviewed despite its interlocutory nature") (citing cases). And the issue is a dispositive one. The school district's speech policy imposes such sweeping restrictions on speech that it could not be upheld unless *O'Brien* applies; in fact, in the proceedings below, Respondents did not even attempt to argue that their policy satisfied *Tinker*. Moreover, because the district court served up a clean legal issue, this Court would have the option of either addressing only that pure issue of law or going forward and applying the correct standard to Respondents' blunderbuss policy.

Respondents also complain that the petition recites certain facts (which they dispute) about how the policy has been applied to discriminate against religious views. *See* Pet. 5–8. But the facts were included to describe the history of the case and to illustrate the grave risks that overbroad, sweeping restrictions on speech pose to students' First Amendment rights—and the temptation for school districts criticized for imposing discriminatory restrictions on speech to opt to eliminate all speech. *See National Endowment for the Arts v. Finley*, 524

U.S. 569, 620 (1998) (the Court has not hesitated to consider "the merits" of facial challenges "to policies that ... vested officials with open-ended discretion that threatened" viewpoint discrimination) (quotation omitted). It is the potential for that abuse—not an actual adjudication—that informs a facial challenge.

Unlike the cases cited by Respondents, which involve "factual assumptions" that could "be evaluated only in the context of an as-applied challenge," *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 444 (2008), the facial challenge in this case "does not rest on factual assumptions." *Stevens*, 130 S. Ct. at 1587. Nor is there any risk that the facial challenge will become moot. *See Renne v. Geary*, 501 U.S. 312, 323–24 (1991). Moreover, determining the standard of review applicable to a school district's policy restricting student speech will not disable government from addressing speech in a more targeted fashion or from targeting the particular types of disruptive speech addressed in this Court's *Tinker* line of cases.

Finally, Respondents admit that there is a "lack of clarity in this Court's jurisprudence regarding the application of the First Amendment in elementary schools," and argue that this issue presents a "worthy question ... to review," albeit not the one presented by Petitioners. Swanson Opp'n 11–12. They reiterate their position below that elementary school students have no free speech rights. This extreme position appears meritless. *See West Virginia State Bd. of Educ. v.*

Barnette, 319 U.S. 624 (1943). But if there is anything to the contention that there is a lack of clarity on this question, it only underscores the need for certiorari. The question Respondents say is cert-worthy would be addressed and clarified if this Court granted review. Respondents' policy applies in elementary schools and in higher grades, and this Court can certainly consider Respondents' remarkable suggestion that the First Amendment rights that are not surrendered at the schoolhouse gates do not attach until junior high school.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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